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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN J. COTA,

Defendant.

Case No. CR 08-0160 SI

**DEFENDANT JOHN J. COTA'S NOTICE  
OF MOTION AND MOTION TO DISMISS  
CLEAN WATER ACT COUNT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: July 18, 2008  
Time: 11:00 AM  
Judge: Honorable Susan Illston

Speedy Trial Act: Excludable Time Through  
Disposition, 18 U.S.C. § 3161(h)(1)(F)

**TO UNITED STATES ATTORNEY JOSEPH P. RUSSONIELLO:**

**PLEASE TAKE NOTICE** that at 11:00 a.m. on July 18, 2008, or as soon thereafter as  
counsel may be heard in the above entitled Court, Defendant JOHN J. COTA ("Captain Cota") will  
and hereby does move this Court for an order dismissing Count Three (for violation of 33 U.S.C. §  
1319(c)(1)) of the Superseding Indictment in this matter pursuant to Rule 12(b) of the Federal Rules

1 of Criminal Procedure. Specifically, Captain Cota requests that the Court dismiss Count Three on  
2 the grounds that it violates the Due Process Clause of the Fifth Amendment to the United States  
3 Constitution. Therefore, Count Three should be dismissed without leave to amend.

4 This motion is based on this Notice of Motion and Motion, the attached Memorandum of  
5 Points and Authorities in support thereof, the complete files and records in this matter, and upon  
6 such other matters as may be presented to the Court at the time of the hearing.

7 Respectfully Submitted,

8 DATED June 13, 2008.

9  
10 KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP

11  
12 By /s/ Jeffrey L. Bornstein

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION.**

Count Three of the Superseding Indictment must be dismissed because it violates the Due Process Clause of the United States Constitution. The Superseding Indictment seeks to convict Captain Cota of a serious crime, with penalties including prison in a federal penitentiary for up to one year, as well as a fine of up to \$100,000, with the potential for an even greater fine.<sup>1</sup> The government seeks this conviction without alleging any criminal intent.

The government does not allege that the leaking of fuel oil from the container vessel M/V COSCO BUSAN ("COSCO BUSAN") was the result of any knowing, willful, intentional, or even grossly negligent conduct on the part of Captain Cota. It alleges no criminal intent at all. Nor does it allege that Captain Cota was involved in an inherently dangerous activity. Instead, the government wants to jail Captain Cota because of his conduct as a pilot of a container vessel. It alleges that he made negligent mistakes in the way he piloted the vessel, which in turn allegedly resulted in the vessel contacting the bridge, which in turn resulted in a gash in the hull, which in turn resulted in the leaking of fuel oil. The Due Process Clause prohibits the imposition of criminal liability under these circumstances.

In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), cert denied, 528 U.S. 1102 (2000), the Ninth Circuit held that 33 U.S.C. § 1319(c)(1) may impose criminal liability based on ordinary negligence as opposed to criminal negligence, without violating the Due Process Clause, in the case of a supervisor who knew he was using heavy excavating equipment very near to a major oil pipeline that was ruptured by the equipment. We respectfully submit that *Hanousek* does not

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<sup>1</sup> See 18 U.S.C. § 3571(d). Under the Alternative Fines Act, the government may seek an amount equal to twice the pecuniary loss caused by the alleged crime. *Id.* The government considers damages to resources to be such a loss. See *United States v. Exxon Corp.*, No. A90-015 CR (D. Ak., filed April 16, 1991) (Gov't Sentencing Memo at 16).

1 foreclose the relief we seek because *Hanousek* is distinguishable and, in any, Count Three violates  
 2 the Due Process Clause, for at least four reasons.<sup>2</sup>

3 The Due Process Clause only permits the imposition of criminal liability without *mens rea* –  
 4 criminal intent – where there is clear evidence that (a) Congress has enacted a “public welfare”  
 5 statute directed at the specific object of the business or transaction that is the basis for the criminal  
 6 charge; (b) the scope and extent of the sanctions imposed in the absence of criminal intent is not  
 7 unreasonably severe; and (c) Congress has expressly indicated that no criminal intent is necessary.  
 8 None of these criteria are met in this case.  
 9

10 First, the public welfare doctrine’s rationale for eliminating the criminal intent requirement  
 11 does not exist in this case. Controlling precedent holds that Congress may lower the level of intent  
 12 necessary for conviction of an offense where defendant is dealing with “deleterious devices or  
 13 products or obnoxious waste materials,” and the dangerous and regulated nature of these items  
 14 places defendant on notice that the law may carefully scrutinize his actions. By contrast, Count  
 15 Three alleges a criminal violation of the Clean Water Act based on conduct that relates solely to the  
 16 operation of a vessel, not the handling of an obnoxious waste material (in this case, presumably oil).  
 17 There are no reported cases finding a container ship (or any boat for that matter) to be either a  
 18 deleterious device or an obnoxious waste material. The Supreme Court has warned that under these  
 19 circumstances, imposing criminal sanctions without requiring some degree of *mens rea* could result  
 20 in “substantial due process questions.” *United States v. Int’l Min. & Chem. Corp.*, 402 U.S. 558,  
 21 564-65 (1971). While we believe that the *Hanousek* court applied the public welfare doctrine in a  
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 23  
 24

25 <sup>2</sup> Whether the Clean Water Act is a public welfare statute based on the rationale that oil is an  
 26 inherently dangerous or noxious pollutant or waste material has been seriously questioned.  
 27 *Hanousek v. United States*, 528 U.S. 1102, 1103 (Thomas, J.) (dissent from denial of certiorari);  
 28 *Staples*, 511 U.S. at 600. We respectfully assert that it is not, and that the rationale relied on by the  
*Hanousek* court to reach that result is subject to serious question. While we have illustrated that  
*Hanousek* is factually distinguishable from the case at bar, we recognize that *Hanousek* may be  
 considered controlling precedent for this court if such distinctions are rejected, and reserve our  
 challenge to that precedent on appeal, if necessary.

1 manner inconsistent with precedent, we recognize that this court is bound by that decision.

2 Regardless, *Hanousek* is distinguishable from the case at bar, because in *Hanousek*, the defendant at  
3 least knew he was operating equipment designed to dig into the ground, and knew he was doing so  
4 next to a major oil pipeline. He was not prosecuted for leaks from the excavation equipment itself  
5 that may have flowed into waters of the United States as a collateral result of his conduct. Indeed,  
6 the defendant in *Hanousek* was acutely aware of the location and dangers presented by the pipeline.  
7 The government has not and cannot make the same claim regarding Captain Cota and the fuel tanks  
8 on the COSCO BUSAN.  
9

10 Second, the punishment here far exceeds the *de minimis* kinds of sanctions that might  
11 otherwise justify the elimination of traditional criminal scienter without offending the Due Process  
12 Clause. Captain Cota faces up to a year in jail, and fines of up to \$100,000, and potentially  
13 unlimited amounts in additional fines, under the Alternative Fines Act.<sup>3</sup> Again this is distinguishable  
14 from *Hanousek*, where the court discussed neither of these consequences. This level of punishment  
15 far exceeds the minimal, regulatory sentences courts have imposed as a result of violations of public  
16 welfare statutes.  
17

18 Third, while the *Hanousek* court concluded that Congress clearly and unambiguously  
19 intended that the term “negligently” in Section 1319(c)(1)(A) means ordinary negligence,  
20 *Hanousek*, 176 F.3d at 1120, the statutory construction analysis used to support this conclusion has  
21 been directly rejected by subsequent Supreme Court precedent as a means of determining  
22 congressional intent, in another case arising in this Circuit. *Safeco Ins. Co. v. Burr*, \_\_\_ U.S. \_\_\_,  
23 127 S.Ct. 2201, (2007) (reversing 140 Fed. Appx. 746 (9th Cir. 2005)). Given this change in the law,  
24 the premise that this term is clear no longer exists, and this court must determine anew how the term  
25 “negligently” should be interpreted. A large body of evidence suggests that “negligently,” when  
26  
27

28 <sup>3</sup> 18 U.S.C. § 3571(d).

used in this criminal statute, was meant to refer to “criminal” or “gross negligence.” These considerations, and the rule of lenity, preclude the inference that ordinary negligence (tantamount to no *mens rea* whatsoever) is constitutionally sufficient for conviction, and render Count Three defective.

Fourth, even assuming *arguendo* that ordinary negligence does not offend the Constitution and is the appropriate standard under the statute, it must be defined consistent with ordinary negligence in maritime casualty cases, as well as negligence cases generally. A long-standing body of precedent provides Captain Cota with various defenses to a charge of negligence in a case at admiralty; to deny Captain Cota the protection of these defenses would essentially assign strict liability to the discharge of pollutants under Section 1319(c)(1). Removing the standard of intent entirely would contravene the express language of the statute (which by its terms requires some form of “negligence”), and would violate Captain Cota’s due process rights.

## II. BACKGROUND FACTS RELEVANT TO COUNT THREE.

Count Three of the Superseding Indictment arises from the accident involving the COSCO BUSAN, a container ship that was used to transport nonhazardous cargo, as she departed the Port of Oakland for the Pacific Ocean and Busan, Korea. The ship scraped the fendering system around one of the towers of the San Francisco Bay Bridge. Count Three alleges that Captain Cota was negligent in:

(a) failing to pilot a collision free course; (b) failing to adequately review with the Captain and crew of the [COSCO BUSAN] prior to departure the official navigational charts of the proposed course, the location of the San Francisco Bay aids to navigation, and the operation of the vessel’s navigational equipment; (c) departing port in heavy fog and then failing to proceed at a safe speed during the voyage despite limited visibility; (d) failing to use the vessel’s radar while making the final approach to the Bay Bridge; (e) failing to use positional fixes during the voyage; and (f) failing to verify the vessel’s position vis-à-vis other established and recognized aids to navigation throughout the voyage.

Superseding Indictment, page 6, ¶ 18. According to the government, the operation of the vessel resulted in the accident, causing a puncture to the side of the vessel where a fuel tank was located. One of the collateral consequences was that fuel oil (called “bunker oil”) used to power the vessel, just as gasoline powers a car, leaked into the Bay. The government has not alleged that any of Captain Cota’s conduct, even if proven, would constitute intentional, knowing, willful or even grossly negligent conduct. The government does not allege that Captain Cota handled the bunker oil that was leaked after the accident, or that he had any more connection to the vessel’s fuel tank than does the driver of an automobile has to his or her gas tank, or that the pilot of a plane has to a jet engine on a passenger aircraft.<sup>4</sup> Nor does the Superseding Indictment allege that Captain Cota was in the business of handling oil, transporting oil, or that he was handling anything other than standard industrial equipment - a vessel - to engage in ordinary commercial activities - assisting her in traversing the Bay.

### III. ARGUMENT.

#### A. There Are Clear Constitutional Limits On Eliminating The *Mens Rea* Requirement For Criminal Prosecution.

##### 1. *Mens Rea* Is A Historical And Well-Established Hallmark For Criminal Liability.

At common law, criminal sanctions required the government to prove that defendant had a “vicious will.” See Blackstone, 4 Commentaries on the Law of England at 21. The concept of *mens rea* has continued in American law as more than a “provincial or transient notion,” but rather “took deep and early root in American soil.” *Morrisette v. United States*, 342 U.S. 246, 250-52 (1952). Indeed, the Court has declared it the “rule of rather than the exception to the principles of Anglo-American criminal jurisprudence.” *Dennis v. United States*, 341 US. 494, 500 (1951); see also *Morrisette*, 342 U.S. at 251 (“[a] relation between some mental element and punishment for a

<sup>4</sup> The Superseding Indictment does not allege that Captain Cota knew or had any reason to know anything about the fuel or fuel tanks aboard the vessel.

1 harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to'). Put  
 2 another way, requiring *mens rea* for criminal liability limits the application of criminal sanctions to  
 3 those who have malevolent culpability, with the intended result of creating a disincentive to "evil"  
 4 behavior. In this way, the criminal law traditionally delineates between undesirable outcomes  
 5 committed in an "immoral" manner, and those outcomes resulting from carelessness, mistake, or  
 6 breach of agreement. *See, e.g.,* Oliver Wendell Holmes, *The Common Law* 3 ("even a dog  
 7 distinguishes between being stumbled over and being kicked").

9                   **2. Relaxation Or Elimination Of The *Mens Rea* Requirement For Criminal**  
 10                   **Liability Occurs Only In Rare Instances Under The Judicially-Created**  
 11                   **"Public Welfare" Doctrine.**

12           Over the last century, a limited exception developed to the requirement that criminal  
 13 sanctions be imposed only if *mens rea* could be proved. Legislatures began to develop and attach  
 14 criminal penalties to "regulatory measures in the exercise of what is called the police power where  
 15 the emphasis of the statute is evidently upon achievement of some social betterment, rather than the  
 16 punishment of the crimes as in cases of *mala in se*." *United States v. Balint*, 258 U.S. 250, 252  
 17 (1922). Courts recognized that certain laws were fundamentally different from traditional criminal  
 18 laws; whereas conventional criminal law kept societal order through the punishment of immoral  
 19 behavior, these new laws sanctioned behavior that threatened the "public safety." *United States v.*  
 20 *Freed*, 401 U.S. 601, 609, rhng denied, 403 U.S. 912 (1971). Under the rubric of the "public welfare  
 21 doctrine," these new laws sought to augment civil and administrative enforcement with criminal  
 22 liability, "whereby penalties serve as effective means of regulation." *United States v. Dotterweich*,  
 23 320 U.S. 277, 280-81 (1943).

24           Courts have applied the "public welfare doctrine" and its exception to the requirement of  
 25 *mens rea* with great care and caution, because criminalizing behavior in the absence of mental  
 26 culpability raises substantial questions of fairness, and could potentially jeopardize the integrity of  
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1 the criminal justice system. *See, e.g., United States v. Int'l Minerals & Chemical Corp.*, 402 U.S.  
 2 558, 564-65 (1971) (the criminal regulation of certain products could raise “substantial due process  
 3 questions if Congress did not require... ‘mens rea’ as to each ingredient of the offense”) (citations  
 4 omitted); *Morrisette*, 342 U.S. at 254 n.14 (noting concern that “[t]o inflict substantial punishment  
 5 upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure  
 6 accident, would so outrage the feelings of the community as to nullify its own enforcement”)  
 7 (*quoting* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 56 (1933)).

8  
 9 The Supreme Court has recognized that “[t]he purpose and obvious effect of doing away with  
 10 the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the  
 11 defendant of such benefit as he derived at common law from innocence of evil purpose, and to  
 12 circumscribe the freedom heretofore allowed juries.” *See Morrisette*, 342 U.S. at 263; *see also*  
 13 *Staples*, 511 U.S. at 615. The Court recognizes, however, that the Due Process Clause does not  
 14 permit Congress to simply pass a law that eliminates this requirement for the convenience of the  
 15 prosecutor. Therefore, a reviewing court must skeptically consider any invocation of the public  
 16 welfare doctrine as a justification to eliminate the imposition of a *mens rea* requirement for  
 17 conviction.  
 18

19  
 20 **3. Constitutional Limitations On The Public Welfare Doctrine Require That**  
 21 **Three Criteria Be Met Before *Mens Rea* May Be Eliminated In Enforcing**  
 22 **A Criminal Statute.**

23 Courts have construed these constitutional limitations to permit the elimination of the intent  
 24 requirement in a criminal statute if three key protections exist: (a) constructive notice (the conduct  
 25 being regulated is so traditionally and obviously inherently dangerous or deleterious that any  
 26 reasonably person engaged in handling such devices would know to be careful, thus making it fair to  
 27 eliminate the “knowledge” requirement); (b) minor penalties (the punishment even in the absence of  
 28 requiring proof of an evil mind) is not so severe as to offend due process; and (c) clear

1 Congressional intent to eliminate the knowledge requirement (reflecting Congress' affirmative  
 2 decision weighing the aforementioned factors). Unless the charge satisfies all three criteria,  
 3 eliminating culpability as an element to an offense could violate the Due Process Clause. *See*  
 4 *Staples v. United States*, 511 U.S. 600 (1994); *United States v. Int'l Minerals & Chemical Corp.*, 402  
 5 U.S. 558, 564-65 (1971); *Morrisette*, 342 U.S. at 254; *Liparota v. United States*, 471 U.S. 419, 433  
 6 (1985), *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960). As explained below, Count Three  
 7 fails to meet each of these criteria.  
 8

9 **B. Count Three Violates Due Process Because It Fails To Meet The Criteria Under**  
 10 **The Public Welfare Exception To The Requirement For Proof Of Criminal**  
 11 **Intent.**

12 Count Three violates Captain Cota's Due Process rights, because it is fundamentally unfair to  
 13 prosecute a defendant based on a violation of a public welfare statute without proving any criminal  
 14 intent, where the defendant was not alleged to be actually and directly dealing with the dangerous  
 15 device or substance that is the focus of the statute. Captain Cota was not handling oil any more than  
 16 a person driving a car handles gasoline that might leak if he is in an accident, or a pilot of passenger  
 17 airliner handles jet fuel that leaks if the plane crashes.

18 In virtually every reported case permitting criminal prosecution without evidence of intent,  
 19 the person prosecuted was in the business of handling the deleterious device – it is a central and  
 20 intrinsic part of the activity and the conduct that constituted the crime, rather than a collateral or  
 21 incidental aspect of the business. *See Balint v. United States*, 258 U.S. 250 (1922) (act of Congress  
 22 regulating narcotics applied to person in the business of dealing in narcotics); *United States v.*  
 23 *Behrman*, 258 U.S. 280 (1922) (same); *United States v. Dotterweich*, 320 U.S. 277 (1943) (act of  
 24 Congress regulating food, drugs, and cosmetics applied to pharmaceutical repackaging company and  
 25 its officers); *United States v. Weisenfeld Warehouse Co.*, 376 U.S. 86 (1964) (act of Congress  
 26 regulating food, drugs, and cosmetics applied to company engaged in the business of warehousing  
 27  
 28

1 food); *United States v. Freed*, 401 U.S. 601 (1971) (act of Congress regulating unregistered firearms  
 2 such as hand grenades applied to persons engaged in possessing and conspiring to possess hand  
 3 grenades); *United States v. Int'l Minerals & Chemicals Corp.*, 402 U.S. 558 (1971) (act of Congress  
 4 regulating shipping of hazardous material applied to corporation in the business of shipping  
 5 hazardous substances).

6  
 7 The Circuits have also taken this approach. *See, e.g., United States v. Weitzenhoff*, 35 F.3d  
 8 1275 (9th Cir. 1994), cert denied, *Mariani v. United States*, 513 U.S. 1228 (1995) (Clean Water Act  
 9 prohibition on unlawful discharge of pollutants applied to operators of wastewater treatment plant in  
 10 the business of discharging pollutants into waters of the United States); *United States v. Hillman*,  
 11 461 F.2d 1081 (9th Cir. 1972) (act of Congress regulating the sale of narcotics applied to a person  
 12 selling cocaine).<sup>5</sup> Indeed, even in cases where the Supreme Court limited the application of the  
 13 public welfare doctrine, the government had charged defendants who were in the business that was  
 14 directly related to the statute in question. *See, e.g., Morrisette v. United States*, 342 U.S. 246 (1952)  
 15 (rejecting liability under statute criminalizing unlawful taking of government property, where  
 16

17  
 18 <sup>5</sup> *See also United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974) (Refuse Act, dealing with  
 19 the discharge of refuse matter, applied to company in the business of storing oil in an oil tank farm);  
 20 *United States v. Bradley*, 455 F.2d 1181 (1st Cir. 1972) (Narcotics Act applied to persons selling  
 21 narcotics); *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) (Clean Water Act provision  
 22 prohibiting falsification of wastewater monitoring applied to company that handled and discharged  
 23 wastewater as an essential part of its business); *United States v. Green Drugs*, 905 F.2d 694 (3d Cir.  
 24 1990) (act of Congress creating recordkeeping requirements regarding the sale of habit-forming  
 25 drugs applied to a pharmacy in the business of selling drugs); *United States v. Wilson*, 133 F.3d 251  
 26 (4th Cir. 1997) (Clean Water Act prohibition on discharging pollutants applied to land developer in  
 27 the business of moving soil and dredged material into and out of waters of the United States); *United*  
 28 *States v. Nguyen*, 916 F.2d 1016 (Endangered Species Act prohibition on import of endangered  
 animals applied to a person in the business of possessing an endangered species); *United States v.*  
*Elshenawy*, 801 F.2d 856 (6th Cir. 1986) (act of Congress prohibiting possession of "contraband  
 cigarettes" applied to person in the business of selling cigarettes); *United States v. H.B. Gregory Co.*,  
 502 F.2d 700 (7th Cir. 1974) (act of Congress regulating food, drugs, and cosmetics applied to  
 bakery supply company); *United States v. Collins*, 949 F.2d 1029 (8th Cir. 1991) (act of Congress  
 regulating storage of explosives applied to industrial construction company that used explosives as  
 an essential part of its business); *United States v. Agnew*, 931 F.2d 1397 (10th Cir. 1991) (Federal  
 Meat Inspection Act applied to a seller of meat); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499  
 (11th Cir. 1986) (RCRA prohibition on unlawful transportation of hazardous waste applied to  
 company engaged in transport of hazardous waste as an essential part of its business); *United States*

1 defendant was in the business of selling scrap such as that obtained from government proving  
2 range); *Liparota*, 471 U.S. at 426 (1985) (rejecting liability under statute criminalizing unlawful  
3 purchase of food stamps, where defendant was a purchaser of food stamps).

4 The touchstone principle permitting the Court to conclude that due process is not offended  
5 where the criminal intent standard is lowered is the axiom of constructive notice. Persons in the  
6 business of discharging wastewater, transporting waste, filling wetlands, and buying and selling  
7 drugs are presumed to understand that the presence of those items in their day-to-day pursuits  
8 requires a degree of care. The Court in *Int'l Minerals & Chemical Corp.* acknowledged this fact by  
9 stating that "pencils, dental floss, [and] paper clips," even if regulated, are not the sort of items that  
10 create sufficient notice to allow for a suspension of *mens rea* that does not offend fundamental  
11 notions of fairness. *Int'l Minerals & Chemical Corp.*, 402 U.S. at 564. Indeed, the maxim "standing  
12 in *responsible relation* to a public danger" implies that the public welfare doctrine is concerned only  
13 with those whose activities are directly related to the public danger itself. *Dotterweich*, 320 U.S. at  
14 281. The Supreme Court has specifically stated that it is not enough that a potentially dangerous  
15 item is subject to regulation, even pervasive regulation; rather, the nature of that item must place its  
16 user on notice that strict regulation is likely extant:

17  
18  
19       Automobiles, for example, might also be termed "dangerous" devices and  
20       are highly regulated at both the state and federal levels. Congress might  
21       see fit to criminalize the violation of certain regulations concerning  
22       automobiles, and thus might make it a crime to operate a vehicle without a  
23       properly functioning emission control system. But we probably would  
24       hesitate to conclude on the basis of silence that Congress intended a prison  
25       term to apply to a car owner whose vehicle's emissions levels, wholly  
26       unbeknownst to him, began to exceed legal limits between regular  
27       inspection dates.

28 *Staples*, 511 U.S. at 614.

*v. Holland*, 810 F.2d 1215 (D.C. Cir. 1987) (act of Congress prohibiting drug trafficking near school zone applied to person in the business of selling narcotics).

1 This Circuit's most recent ruling regarding the public welfare doctrine as it applies to the  
 2 Clean Water Act is distinguishable and involved a more narrow application of the public welfare  
 3 doctrine than the government proposes in Count Three. In *Hanousek*, the Ninth Circuit held that the  
 4 public welfare doctrine should apply because defendant "[did] not dispute that he was aware that a  
 5 high-pressure petroleum products pipeline owned by Pacific & Arctic's sister company ran close to  
 6 the surface next to the railroad tracks at 6-mile, and [did] not argue that he was unaware of the  
 7 dangers a break or puncture of the pipeline by a piece of heavy machinery would pose." *Hanousek*,  
 8 176 F.3d at 1122. Thus, arguably the defendant in *Hanousek* "stood in responsible relation to a  
 9 public danger" because he was responsible for the operation of the backhoe, a piece of equipment  
 10 designed to dig into things and break them apart, and because he was on notice of the nearby oil  
 11 pipeline, and, consequently, he was on notice that use of the backhoe in its intended way could put a  
 12 hole in a nearby pipeline. *Hanousek*, 176 F.3d at 1122; *Dotterweich*, 320 U.S. at 281. The Ninth  
 13 Circuit did not conclude that the defendant would have been liable had the backhoe flipped and  
 14 ruptured its gas tank, the contents of which leaked into a waterway. Nor does the logic in *Hanousek*  
 15 dictate such a result.<sup>6</sup>

18 Count Three does not allege (nor can it) that Captain Cota was in the business of handling oil  
 19 because his vessel had a fuel tank. There is no allegation that the COSCO BUSAN is a deleterious  
 20 or dangerous device, or that she was even an oil tanker. Count Three is based on allegedly negligent  
 21 conduct unrelated to the fuel tank, that had consequences for that tank, the contents of which are  
 22 addressed in a public welfare statute that arguably authorizes prison for ordinary negligence relating  
 23 to the fuel tank. No court has held that a pilot responsible for assisting in escorting a non-tanker  
 24

26 <sup>6</sup> Similarly, the Court in *Dotterweich* imposed liability on a pharmaceutical manager for his failure  
 27 to affix the proper branding to its product. The defendant in that case was in the business of  
 28 manufacturing drugs and dealing with drugs was his day-to-day activity. However, that is far  
 different than prosecuting *Dotterweich* for a crime, and putting him in jail, if oil in the furnace of the  
 building owned by his landlord leaks as a collateral consequence of an accident in the building.

1 container vessel stands in a responsible relation with the fuel tank on that vessel such that he can be  
2 criminally prosecuted if an accident occurs and the fuel tank leaks, without proving any criminal  
3 intent. *Cf. United States v. Hill*, No. 05-CR-10111 (D. Mass. Filed Sept. 16, 2005) (Gov't  
4 Sentencing Memorandum at 4-6) (Mate of tug towing fuel barge sentenced for violation of  
5 Section 1319(c)(1); government argued that defendant's actions "amounted to more than simple  
6 negligence" and that "gross negligence caused the spill"). In fact, we are unaware of any case in  
7 which Section 1319(c)(1)(A) has been held to be a constitutionally permissible basis for charging  
8 anyone with negligently discharging a pollutant where the factual basis of the charge involves a leak  
9 from the fuel tank of a non tanker vessel that was a collateral consequence of other actions unrelated  
10 to the fuel tank or the contents of the fuel tank.  
11

12 Imposing liability in this case would "expose countless numbers...to heightened criminal  
13 liability for using ordinary devices to engage in normal industrial operations." *Hanousek v. United*  
14 *States*, 528 U.S. 1102, 1103 (Thomas, J.) (dissent from denial of certiorari).<sup>7</sup> Eliminating the intent  
15 requirement based on a defendant's use of an "ordinary device[] to engage in normal industrial  
16 operations," *id.*, violates fundamental fairness enshrined in the Due Process Clause. Concluding that  
17 the Superseding Indictment is permissible under the Due Process Clause would immediately convert  
18 every driver of every car into a criminal if he or she negligently causes an accident, which results in  
19 their gas tank leaking into a nearby creek. Because Count Three does not and cannot allege any  
20 facts that place Captain Cota in the kind of responsible relationship with the fuel tanks that has been  
21 held to be a constitutionally permissible basis for asserting criminal liability under  
22 Section 1319(a)(1)(A) without proof of intent, it must be dismissed as unconstitutional under the  
23 Due Process Clause of the Fifth Amendment.  
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25  
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27  
28 <sup>7</sup> The Ninth Circuit has, in the past, found the reasoning of a dissent from a denial of certiorari to be  
persuasive. *See, e.g., Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir. 1994) (*citing Glass v. Louisiana*, 471 U.S. 1080 (Brennan, J.) (dissent from denial of certiorari)).

C. **The Superseding Indictment Violates The Due Process Clause Because It Seeks To Impose Penalties Far Too Severe To Eliminate The Criminal Intent Requirement.**

Courts have upheld the elimination of the scienter requirement in public welfare statutes only when they impose criminal sanctions that are relatively minor. Then-Circuit Judge Blackmun, in *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960), held that imposition of criminal liability without *mens rea* would not violate the Due Process Clause where, *inter alia*, “the penalty is relatively small, [and] where conviction does not gravely besmirch [defendant’s reputation]....” Again, this limitation arises from the type of offenses typically codified in public welfare statutes: regulatory offenses meant to create an added incentive for careful action on the part of those dealing in inherently dangerous substances that pose a public threat. *See Morrisette*, 342 U.S. at 262; *Balint*, 258 U.S. at 254.<sup>8</sup> Indeed, the first criminal statutes that relaxed the standard of intent did so for crimes with penalties far smaller than those at issue in this case. *See, e.g., Holdridge*, 282 F.2d at 304 n.1 (upholding application of statute without scienter element where penalties were up to \$500 in fines and six months in jail); *Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine of up to \$200 or six months in jail, or both); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (fine); *People v. Snowburger*, 113 Mich. 86, 71 N. W. 497 (1897) (fine of up to \$500 or incarceration in county jail). By contrast, penalties that pose substantial hardship to a defendant, or sanctions that would ruin a defendant’s reputation in the community are more appropriate where defendant’s conduct is at odds with social mores, and does not simply run afoul of a regulatory offense.

Severe penalties and reputational damage are inappropriate in cases where there is no “evil” intent whatsoever. *See United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985) (upholding dismissal of indictment charging violation of felony provision of Migratory Bird Treaty Act, a strict liability offense, based on the gravity of the penalties – two years in prison and \$25,000 fine, and the

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<sup>8</sup> *See n.2 supra*

1 potential damage to defendant's reputation). More severe levels of penalties for a crime where the  
2 intent element has been abolished have "aroused the concern of responsible and disinterested  
3 students of penology." *Morrisette*, 342 U.S. 254 n.14; *see also* Sayre, *Public Welfare Offenses*, 33  
4 Colum. L. Rev. at 56; Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of*  
5 *Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L.J. 2407, 2472-84 (1995);  
6 Charles J. Babbitt *et al.*, *Discretion and the Criminalization of Environmental Law*, 15 Duke Env.  
7 Law & Pol'y Forum 1 (2004).

9 The prospect of penalties and damage to character in this case is far higher than in *Holdridge*,  
10 and is, in some ways, even more severe than the statute struck down in *Wulff*. One year in prison is  
11 twice as long as the six months deemed not severe in *Holdridge*; \$100,000 in fines is more than ten  
12 times the fine considered too severe in *Wulff*, and the potential for even greater fines under the  
13 Alternative Fines Act creates prospects that are profoundly serious.<sup>9</sup>

15 Further, as in *Wulff*, Captain Cota faces severe reputational risk in the case of a conviction.  
16 Indeed, even being indicted effectively ended Captain Cota's career as a pilot. A conviction would  
17 surely foreclose any possibility of continuing his 26-year career as a pilot. Further, this prosecution  
18 has received massive media attention. Collectively, these massive sanctions are not consistent with  
19 the purposes of the public welfare doctrine, because they act more as a punishment than for the  
20 purpose of "achievement of some social betterment." *Balint*, 258 U.S. at 252. Based on the above,  
21 imposition of such a severe sanction without a showing of criminal intent would violate Captain  
22 Cota's rights under the Due Process Clause of the Fifth Amendment to the United States  
23 Constitution.  
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28 <sup>9</sup> 18 U.S.C. §3751(d). Indeed in one case involving a similar charge against the owner of an oil  
tanker, a \$25 million fine was imposed based on the Alternative Fines Act.

1           **D. Congress Did Not Clearly And Unmistakably Intend To Criminalize Ordinary**  
 2           **Negligence Under The Clean Water Act.**

3           Even if Captain Cota were found to be in the business of dealing in an inherently dangerous  
 4 substance or device, and even if the regulation of that substance poses relatively mild criminal  
 5 penalties, a court may not suspend or relax the scienter requirement absent clear and unmistakable  
 6 congressional intent. *See, e.g., Balint*, 252 U.S. at 253 (“[t]he question before us, therefore, is one of  
 7 the construction of the statute and of inference of the intent of Congress”); *Morrisette*, 342 U.S. at  
 8 262 (“Congressional silence as to mental elements in an Act merely adopting into federal statutory  
 9 law a concept of crime already so well defined in common law and statutory interpretation by the  
 10 states may warrant quite contrary inferences than the same silence in creating an offense new to  
 11 general law, for whose definition the courts have no guidance except the Act.”); *see also Crosby v.*  
 12 *Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) (finding an inference of congressional intent  
 13 from silence “unwarranted” because the silence was ambiguous); *Burns v. United States*, 501 U.S.  
 14 129, 136 (1991) (“An inference drawn from congressional silence certainly cannot be credited when  
 15 it is contrary to all other textual and contextual evidence of congressional intent.”).

16           We recognize that this Circuit has construed 33 U.S.C. § 1319(c)(1)(A) to permit criminal  
 17 liability to be imposed without any criminal intent, and instead based on the presence of ordinary  
 18 negligence. *Hanousek*, 176 F.3d at 1120. However, we respectfully submit that this decision should  
 19 not control this Court’s interpretation of 33 U.S.C. § 1319(c)(1)(A) for two reasons. First, the  
 20 *Hanousek* court’s ruling is based entirely on a construction that is premised on comparing the use of  
 21 particular words in a criminal statute with those used in a civil statute under the statutory  
 22 construction principle calling for reading similar statutes *in pari material*. In a case from this  
 23 Circuit, the Supreme Court has expressly declared it wrong to use such an analysis for determining  
 24 Congressional intent. *Safeco Ins. Co.*, 127 S.Ct. at 2210. Therefore, the Ninth Circuit’s basis for  
 25 concluding that Congress clearly and unambiguously intended that an ordinary negligence standard  
 26  
 27  
 28

1 be used is no longer valid, leaving this Court with the obligation to determine anew how to interpret  
 2 the use of the word “negligently” in the statute. Because Congress did not clearly or unambiguously  
 3 state its intent to eliminate the requirement for criminal intent, Count Three which attempts to do so,  
 4 violates the Due Process Clause.

5  
 6 **1. The *Hanousek* Court’s Interpretation Of 33 U.S.C. § 1319(c)(1)(A) Is Invalid.**

7 In *Hanousek*, defendant argued that “negligently,” as used in 33 U.S.C. § 1319(c)(1)(A),  
 8 should be interpreted to mean criminal or gross negligence. The Ninth Circuit disagreed. First, the  
 9 court found that “negligently” ordinarily means the failure to exercise reasonable care.<sup>10</sup> *Hanousek*,  
 10 176 F.3d at 1120. The court also noted that 33 U.S.C. § 1321(b)(7)(D) provided for increased civil  
 11 penalties where the discharge of oil resulted from gross negligence. *Id.* at 1121. The court reasoned  
 12 that Congress had included the word “gross” in the civil penalties provision, and excluded it in the  
 13 criminal enforcement provision. Therefore, applying the doctrine of *in pari materia*, as a principle  
 14 of statutory interpretation, the court concluded that Congress knew how to require gross negligence  
 15 and because it did not do so in the criminal provision, it was its clear intent that ordinary negligence  
 16 standard apply. *Id.* The Ninth Circuit relied entirely on the use of a term in a civil statute to  
 17 construe a corresponding phrase in a criminal statute. *Id.*

18  
 19  
 20 In *Safeco Ins. Co.*, plaintiff (a consumer) sued defendant (an insurance company) under the  
 21 Fair Credit Reporting Act (“FCRA”), which entitled plaintiff to notice when adverse action was  
 22 taken by defendant on the basis of plaintiff’s credit report. Under the FCRA, a defendant is liable  
 23 where she “willfully fails” to provide this notice. 15 U.S.C. § 1681n(a). The issue was whether the  
 24 term “willfully” meant “recklessness” or was limited to “knowing” conduct. The insurance  
 25

26  
 27 <sup>10</sup> Because the *Hanousek* court concluded based on application of statutory construction rules, that  
 28 Congress expressly intended an “ordinary negligence” standard, it did not have to address the  
 overwhelmingly common use of gross negligence for statutes creating criminal negligence fines.  
*See infra* at 21-22.

1 company argued, *inter alia*, that “willfully” in the civil statutes should be interpreted consistent with  
2 its use in a parallel criminal statute.

3 The Supreme Court rejected that argument, reasoning that in the criminal law, “willfully”  
4 creates an extra element of proof for the government, whereas in civil statutes, “the term typically  
5 presents neither the textual nor the substantive reasons for pegging the threshold of liability at  
6 knowledge of wrongdoing.” *Id.* at 2208 n.9. In essence, the Supreme Court held that a court may  
7 not use the doctrine of *in pari materia* to justify inferring something about Congress’ intent in a  
8 criminal statute based upon their word choice in a civil statute, because civil and criminal statutes  
9 operate under a vastly different set of rules and conventions. *Id.* Based on this reasoning the Court  
10 held that “the vocabulary of the criminal side of FCRA is consequently beside the point in  
11 construing the civil side.” *Safeco Ins. Co.*, 127 S.Ct. at 2210.  
12

13 Thus, the *Hanousek* court’s rationale - relying on the “intent” terms of a civil statute to  
14 inform it as to Congress’ clear and unambiguous intent with respect to the intent standard in a  
15 parallel criminal statute - cannot be reconciled with *Safeco Ins. Co.*<sup>11</sup> At least one district court has  
16 agreed. *United States v. Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514 at \*13 n.17 (D.N.J.  
17 2007) (“We believe there is good reason to scrutinize carefully that aspect of *Hanousek*, rather than  
18 accepting it as controlling”). If this court agrees that the Supreme Court has ruled that the analytical  
19 framework used by the *Hanousek* court to conclude that Congress unambiguously intended that an  
20 ordinary negligence standard apply, then it is appropriate for it to consider the interpretation of the  
21 negligence provision anew.  
22

23 In criminal law, it is a “fundamental principle that no citizen should be held accountable for a  
24 violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly  
25

26  
27 <sup>11</sup> We assume arguendo that the “gross negligence” civil provision that the Ninth Circuit used to  
28 compare the “negligence” criminal provision are parallel provisions that are properly subject to  
applicaton of the *in pari materia* doctrine because the Ninth circuit held as much, and reserve our

prescribed.” *United States v. Santos*, \_\_\_ U.S. \_\_\_, 2008 WL 2229212 (2008). (“Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”). Serious questions persist as to the exact meaning of “negligently” in 33 U.S.C. § 1319(c)(1)(A); these serious questions may not be resolved in favor of liability according to the Due Process Clause of the Fifth Amendment. *See, e.g. Ladner v. United States*, 358 U.S. 169 (1958) (a conviction is inappropriate where liability would be “based on no more than a guess as to what Congress intended.”).

**2. An Appropriate Interpretation Of 33 U.S.C. § 1319(c)(1)(A) Would Construe The Use Of “Negligently” To Set The Standard Of Intent As Gross Negligence.**

The Supreme Court has noted that a common law term in statutes has generally been construed based on its “common law meaning” *in the context of the most applicable source of common law*. In this case, the statute at issue is a criminal enforcement provision. *See e.g. Beck v. Prupis*, 529 U.S. 494, 501 (2000) (explaining that a civil cause of action even under RICO statute should be construed by civil law principle).

Therefore, the “obvious source in the common law” to construe the statute is the criminal law. Examining, then, the general law of crimes, it is well settled that criminal negligence does not generally mean ordinary negligence. Most often, crimes that replace traditional *mens rea* with a “criminal negligence” standard are construed to require some level of actual mental culpability – at least gross or wanton negligence. *See, e.g., American Law Institute, Model Penal Code* § 2.02(2)(d) (1985) (“[criminal negligence] involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation”); Modern Federal Jury Instructions § 41.02, Inst. 41-27 (“[g]ross negligence means conduct amounting to wanton or reckless disregard for human life”); CALJIC § 3.36 (“criminal negligence means conduct which is more than ordinary negligence”); 2-

rights to appeal that issue. At least one other court has questioned that premise. *United States v.*

1 33 Va. Model Jury Inst. No. 33.610 (“In order for criminal liability to result from negligence, it must  
 2 necessarily be reckless or wanton and of such a character as to show disregard of the safety of  
 3 others...”); Pa. SSJI (Crim) § 15.2504 n.1 (“Criminal negligence is not the same entity as that in the  
 4 civil system”).<sup>12</sup> The rationale behind this distinction is apparent: the criminal law, from its very  
 5 inception, has focused on meting out punishment for conduct motivated by a deviance from social  
 6 mores; mistakes are not sins. *See supra* Part III.A.1.

8 The Court may consider other laws that are appropriately relevant. *See, e.g., American*  
 9 *Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 82 (1956) (construing Section 411 of the  
 10 Civil Aeronautics Act in light of the Federal Trade Commission Act, because they shared a common  
 11 purpose, even though the language was similar but not identical); *United States v. Dixon*, 347 U.S.  
 12 381, 384-85 (1954) (finding the construction of analogous statutes is “most persuasive” for purposes  
 13 of statutory interpretation). Here the Court may look to 46 U.S.C. §2302, which imposes criminal  
 14 liability on any person who operates a vessel with gross negligence.  
 15

16 Given (a) the ambiguity inherent in the term “negligently,” (b) the requirement that criminal  
 17 statutes should not be interpreted to eliminate the *mens rea* requirement absent clear congressional  
 18 intent, (c) the lack of any clear congressional directive here, (d) the overwhelming evidence that in  
 19 most cases involving criminal negligence a gross negligence standard is applied, the proper standard  
 20 of intent applicable to Count III is gross negligence.  
 21

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22  
23  
24  
25 *Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514 at \*13 n.17 (D.N.J. 2007).

26 <sup>12</sup> Plainly, these instructions differ substantially from an instruction based on ordinary negligence.  
 27 *Cf. Atl. States Cast Iron Pipe Co.*, 2007 WL 2282514 at \*13 (jury instruction for ordinary negligence  
 28 under the CLEAN WATER ACT: “[a] person negligently violates the Clean Water Act by failing to  
 exercise the degree of care that someone of ordinary prudence would have exercised in the same  
 circumstances, and, in so doing, discharges any pollutant into United States waters without or in  
 violation of a water permit.”).

1           E.     Even If An Ordinary Negligence Standard Applies, That Term Should Be  
 2                 Construed To Include All Defenses Available To Captain Cota In A Negligence  
 3                 Case At Admiralty.

4           Even assuming arguendo that the Due Process Clause permits imposition of criminal liability  
 5           for violations of 33 U.S.C. § 1319(c)(1)(A), the parameters of an “ordinary negligence” case must be  
 6           informed by the defenses available in a negligence context. If this Court were to construe the statute  
 7           as permitting imposition of criminal liability based on ordinary negligence as generally defined, and  
 8           not permit the use of defenses typically available to defeat such a *prima facie* case, the Court would  
 9           essentially transform 33 U.S.C. § 1319(c)(1)(A) into a strict liability statute. Such a construction not  
 10          only contravenes the express language of the statute, it would run afoul of even the broadest  
 11          construction of the public welfare doctrine. Consequently, to the extent Count Three is read to  
 12          assign liability based on ordinary negligence, it must also afford Captain Cota the defenses available  
 13          to him in a negligence case at admiralty, or Count Three will violate his right to due process.

14           As stated above, the use of ordinary negligence to assign fault in a criminal action is quite  
 15          rare. Indeed, the very definition of ordinary negligence used by the *Hanousek* court is borrowed  
 16          from the civil law. *See Hanousek*, 176 F.3d at 1120 (quoting *Black’s Law Dictionary* 1032 (6th ed.  
 17          1990)). As a consequence, the precise elemental definition of ordinary negligence is best borrowed  
 18          from an analogous source. Given that this entire case centers on a marine accident, the most logical  
 19          place from which to construe the meaning of ordinary negligence is in the context of admiralty law.

20           There exists a large and long-standing body of precedent of admiralty law that provides  
 21          specific defenses in a maritime negligence case. For example, if there is negligence on the part of  
 22          two or more parties in an admiralty case, those parties shall share liability based on the comparative  
 23          degree of their fault. *United States v. Reliable Transfer*, 421 U.S. 397 (1975); *see also Exxon Co.*  
 24          *USA v. Sofec., Inc. (The Exxon Houston)*, 517 U.S. 830 (sole fault is placed on the party whose  
 25          unexpected actions intervened to cause marine casualty). Further, a pilot is the servant of the vessel,  
 26          27          28

1 serves at the supervision of the master of the ship, and may be removed by the master if his  
 2 performance puts the vessel at risk. *Guy v. Donald*, 203 U.S. 399 (1906); *Societa per Azione de*  
 3 *Navigazione Italia v. City of Los Angeles*, 183 Cal. Rptr. 51 (1983), cert denied, 459 U.S. 990  
 4 (1982); 2 Schoenbaum, Admiralty and Maritime Law 81 (4<sup>th</sup> Ed. 2004) (“the pilot is subject to the  
 5 ultimate supervision and control of the master.”). Further, fault is not determined simply by the fact  
 6 an accident occurred. See *The Putney Bridge*, 219 F. 1014 (D. Md. 1915) (“Whether [the navigator]  
 7 neglected something [that he] should have done must be determined, not by the result, but by the  
 8 situation as it presented itself to him at the time.”); *Dahlia Maritime Co. v. M/S Nordic Challenger*,  
 9 1994 AMC 2208, 2218 (E.D. La. 1994). Even general California law calls for certain defenses to an  
 10 action sounding in ordinary negligence, such as comparative fault. See, e.g., *Li v. Yellow Cab Co.*,  
 11 532 P.2d 1226 (1975) (adopting a pure comparative fault scheme for California).

12  
 13  
 14 If Count Three is read to create criminal liability based on the civil negligence standard, the  
 15 entire civil negligence standard, including defenses, should be adopted. Any other such a  
 16 construction would violate Captain Cota’s rights under the Due Process Clause of the Fifth  
 17 Amendment to the United States Constitution.

### 18 **III. CONCLUSION.**

19 For the foregoing reasons, Count Three of the Superseding Indictment violates Captain  
 20 Cota’s due process rights, and should be dismissed with prejudice.  
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22 Dated: June 13, 2008.

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